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ABSTRACT

The current status of affirmative action on the college campus is examined. Following a definition of affirmative action, the history of and social influences on affirmative action are discussed, focusing on the actions of the executive and legislative branches of the Federal government and on court litigation that has tested and refined the concepts involved in affirmative action. The disparate-treatment method of redress under Title VII is discussed in terms of court cases against colleges, universities and other employers. Research on affirmative action in higher education, which deals primarily with student and administrator attitudes, is also reviewed. It is felt that higher education bears a responsibility to provide moral and intellectual leadership in matters of social justice such as affirmative action. A list of 27 references is included. (KM)

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Affirmative Action In Higher Education

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Affirmative Action in Higher Education

This article examines the current status of Affirmative Action on the college campus. Following a definition of affirmative action, this paper examines both the history and the social factors which serve to clarify affirmative action in the legislature and on the college campus. Institutions of higher learning are leaders in issues of social justice, and affirmative action, through effective leadership, must continue to renew its commitment there.

Affirmative Action in Higher Education

The term affirmative action entered the vocabulary of educators approximately 25 years ago. Since then it has served as the subject of emotional debate and the catalyst of judicial decree. It is a concept which has been wrongly associated with reverse discrimination, quota systems, excessive and unnecessary interference of the Federal government, and lowering of standards in higher education. Trying to define affirmative action is as difficult as trying to say what it is not. Following an attempt to clarify the term, this paper examines both the history and the social factors which define affirmative action in the legislature, in litigation, and on the college campus.

Definition of Terms

Affirmative action was defined in 1975 by the Carnegie Council on Policies in Higher Education as:

> ... action to eliminate discrimination: creation of more adequate pools of talent, active searches for talent wherever it exists, revision of policies and practices that permitted or abetted discrimination, development of expectations for a staff whose composition does not reflect the impacts of discrimination, provision of judicial processes to hear complaints, and the making of decisions without improper regard to sex, race, or other origin (p.1).

Affirmative action, then, is a series of positive steps designed to eradicate any traces of past and current discrimination by ensuring that

individuals who are not traditionally associated with specific employment positions are actively sought, encouraged and given an opportunity to become affiliated with those positions at every level of human involvement and employment (Holmes, 1974: Reed, 1983: Sandler, 1974).

Affirmative Action Legislation

There are primarily six separate federal regulations and laws which cover affirmative action in institutions of higher education, the beginnings of which can be traced to the Fourteenth Amendment of the Constitution. "... no state shall ... deny to any person within its jurisdiction the equal protection of the laws." Although cases covered under the protection clause of the Fourteenth Amendment are not usually extended to colleges and universities (Lindgren, Ota, Zirkel, & Van Gieson, 1984), the framework of the other regulations have their basis here.

In June, 1941, civil rights leaders, led by A. Phillip Randolph (president of the Brotherhood of Sleeping Car Porters) demanded that President Franklin D. Roosevelt take action to end employment discrimination in defense industries. If Roosevelt refused to sign the order, Randolph was prepared to lead a protest march on Washington, D.C. Roosevelt signed and Executive Order Number 8802, ending hiring discrimination practices in all companies with federal contracts, became law.

The original efforts of this first executive order were based on the assumption that simply opening employment opportunities would eliminate discrimination. By the 1960s, it became apparent that more was needed. In June, 1961, President John F. Kennedy signed Executive Order Number 10925

which added penalties for noncompliance and budgets for enforcement of nondiscriminatory hiring practices.

President Lyndon B. Johnson's Executive Orders Number 11246 in 1965, and Number 11375 in 1967, expanded these practices. These orders initiated the Office of Federal Contract Compliance in the U.S. Department of Labor (OFCC), which then delegated the enforcement of all educational agencies to the Department of Health, Education, and Welfare (HEW). When an agency or institution receives money from the federal government, they agree to two specific clauses in the contract:

1.) a commitment to avoid discrimination against job applicants and employees because of their race, color, religion, sex, and national origin (this is referred to as the Equal Employment Opportunity clause) and

2.) a commitment to take affirmative action to insure that applicants for employment and employees are treated during employment without regard to their race, color, religion, sex, and national origin (this is referred to as the Affirmative Action clause) (Lindgren et al., 1984).

Title VII, as amended by the EEO Act of 1972, makes it illegal to discriminate in institutions of 15 or more employees who receive federal contracts of over $10,000.00. Some colleges and universities have attempted to avoid this law on the basis of church or state relation. In EEOC v. Mississippi State College (1981), the Fifth Circuit Court declared that separation of church and state does not protect church related colleges from liability under Title VII. A similar ruling held in Shawer v. Indiana University of Pennsylvania (1979), where the Third Circuit Court of Appeals declared that State Universities cannot claim exemption from liability under Title VII by invoking the doctrine of sovereign immunity.

Three provisions of Title VII are critically important to colleges and universities and merit special attention at this time. Employers in higher education can not:

1.) fail, refuse to hire or discharge an individual with respect to his/her compensation, terms, conditions, or privileges of employment because of that individual's sex;

2.) limit, segregate, or classify an employee or an applicant for employment that would deprive or tend to deprive that individual on the basis of sex; and

3.) discriminate because an individual has previously opposed, made a charge, testified, assisted, or participated in the investigation, proceedings or hearing for a sex discrimination suit (Lindgren et al., 1984).

Title IX, signed by President Gerald Ford in 1975, prohibits sex discrimination in educational programs and activities receiving federal funds. The Department of HEW issued regulations governing the operations of federally funded educational programs. These regulations, administered by the Department of Education, interpreted the statute to extend to employment practices. Litigation challenging this interpretation ended in the Supreme Court in 1982 holding that employment discrimination does indeed come under the prohibitions of Title IX.

The current status of affirmative action within the legislature has evolved from a 200 year old constitutional guarantee. Court cases throughout the years have five main findings:

1.) it is the <u>consequence</u> of an employer's action, not the <u>intent</u> which determines discrimination, since the relevant qualifications of a job applicant or employee are determined by the requirements of the job alone;

2.) qualifications for tenure are normally higher than those required for appointment;

3.) the plaintiffs need not show that they were the best qualified for the job in order to prevail in a suit, for the burden of proof is on the employer who must show good faith efforts to ensure the equality of all employment opportunities;

4.) a finding by the employer of inadequate scholarship or teaching performance is sufficient rebuttal, especially if the plaintiff has been given adequate warning about poor performance; and

5.) reliance upon double standards, stereotypes, out dated notions about a women's proper place, women's libbers, or women's studies programs have all been shown to establish violations by showing pretext (Lindgren et al., 1984, McCune & Matthews, 1975).

Affirmative Action in Litigation

The most often cited source of support for Affirmative Action in Higher Education through litigation is Title VII. There are two methods for the judicial application of Title VII which involve different elements, but can be applied to the same set of facts. The first is disparate-impact which is typically applied only in cases involving examinations, educational prerequisites, seniority systems, or any other device neutral on its face, but can be shown to disfavor one sex, nationality, or racial group. Cases filed under the disparate-impact method are most appropriate when employment qualification operates to the detriment of minorities or women by excluding them from consideration at hiring or promotion time. This method is least effective when evaluating a qualification to one particular employment

opportunity or when the employment decision is challenged by one who is considered but rejected because of unfavorable characteristics which the employer claims made the applicant unsuitable for the job. This application of Title VII is usually not applied in university faculty employment decisions (Kramer, 1982).

The second, and more common method of redress under Title VII is through the disparate-treatment method. This method examines the legality of a particular employment decision where proof is required to not only show that the plantiff was treated differently, but also that the disparity of treatment was intentionally based on race or sex (Kramer, 1982). Because most of the court cases involving higher education use this method, it will be outlined more specifically below.

Two court cases which define the current limits of judicial intervention in sex discrimination suits against colleges and universities are Lynn v. Regents of the University of California, 1981 and Laborde v. Regents of the University of California, 1982. In both cases, female faculty members within the Foreign Language Department (Lynn taught French and Laborde taught Italian) were denied tenure (Lynn) or promotion (Laborde) based on the University of California at Irvine's review system which evaluates a candidate's research, teaching, service to the University and public service as a part of their decisions. Suit was brought against the university under Title VII sex discrimination. In both cases, the courts used both subjective and objective information toward their decision. The objective data offered was statistical in nature, proving discrimination with percentages of women and men who were tenured and promoted. Both Lynn and Laborde wer successful in their suits against the university.

The courts, unsure of how to evaluate the university's requirement of tenure and appointment, have historically been reluctant to interfere with internal academic decision making. One reason the courts choose to stay out of college and university employment decisions is an inability to review the complex and subjective factors involved in evaluating candidates. The courts have also stayed out because so many of the decisions involve finances and the courts feel strongly that they should not intervene in financial decisions. A probable third reason for the non-interference of the courts is that many of the university's decisions are subject to protection by the First Amendment (Kramer, 1982; Tarnapol, 1983). The courts have seldom found that the aggrieved female academician should be awarded appointment, position, or promotion for one of two reasons. Either it is too difficult for the plantiff to overcome this judicial non-intervention, or else the women must prove their case under obtuse standards. "(T)he law does not require, in the first instance, that employment be rational, wise, or well-considered -- only that it be non-discriminatory" (Powell v. Syracuse University, 1978, 1156-1157).

The order and allocation for proof of Title VII employment discrimination falls under the disparate-treatment method established by the Supreme Court in McDonnell Douglas Corporation v. Green, 1973. In this race discrimination case the plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." Once established, the burden of proof shifts to the employer to "articulate some legitimate, non-discriminatory reason (for its action)" (p. 802). If the employer is successful at this stage, the employee then must prove the employer's justification is not the real reason, but rather a pretext for discrimination. The courts have adopted the McDonnell Douglas criteria for use in university

discrimination suits. In the academic field, then, four factors for a prima facie case in sex discrimination are:

1.) that the plaintiff belonged to a disadvantaged class,

2.) that the plaintiff sought and was qualified for the position,

3.) that the plaintiff was rejected for the position, and

4.) that college and university sought to fill or had filled the desired position with persons possessing similar qualifications at approximately the same time. The courts have consistently approved the application of McDonnell-Douglas test to determine charges of discrimination in academic context. (See Smith v. University of North Carolina, 1980; Whiting v. Jackson State University, 1980; Jepson v. Florida Board of Regents, 1980; Sweeney v. Board of Trustees of Keene State College, 1980; Kunda v. Muhlenberg College, 1980; Davis v. Weigner, 1971; and Powell v. Syracuse University, 1978, for other examples of disparate-treatment under Title VII in colleges and universities.)

In a recent landmark case of sex discrimination against a county agency (Johnson v. Transportation Agency, Santa Clara County, California, et al., 1987), a male employee was passed over for promotion in favor of a female employee. Johnson (the male) filed suit under Title VII. The Supreme Court held that Title VII had not been violated by the county because they took sex into account in their decision. The county's decision to hire the woman instead of the man was made pursuant to their Affirmative Action plan directing that sex or race may be considered for the purpose of remedying underrepresentation of women and minorities in traditionally segregated job categories. In 1978, Santa Clara County had developed their Affirmative Action plan which included a statement that authorized the agency to use the

sex of the applicant as one determiner in their decision making process. This, the high court said citing McDonnell Douglas, was not in violation of Title VII because the "existence of an affirmative action plan provides such a rationale" for its choice of hiring practices (p. 1449).

The Supreme Court has refused to hear any more cases involving voluntary affirmative action (Lindgren et al., 1984; Schnapper, 1984), yet many of the lower courts have indicated that affirmative action in employment is legal and does not constitute preference when undertaken to remedy past discrimination. No institution is required to hire women or minorities on the basis of sexual or racial preference, for that indeed would be illegal. Rather, affirmative action is aimed at ending the history of preferential treatment given to white males.

Affirmative Action in Higher Education

Defining and implementing affirmative action has been more of a issue in higher education than almost anywhere else (Reed, 1983). It has been called a "cop out" by civil and human rights leaders who claim it is a method for pretending to deal with the very real problem of discrimination in higher education. It has been called "reverse discrimination" and a "quota system" by outspoken members of minorities and women's groups who insist that affirmative action in higher education is occurring in name only. Yet despite all the outcry against affirmative action, the gains made by the creation of an environment where individuals are given an opportunity to compete on an equal basis far outweigh any arguments thus presented (Reed, 1983).

All colleges and universities seeking federal money must pledge nondiscrimination hiring practices. Institutions with fifty or more employees

and federal contracts of $50,000.00 or more must develop written affirmative action plans with numerical guidelines and timetables outlined by the Department of Labor. These plans include, but are not limited to, designing and disseminating Equal Employment Opportunity (EEO) policies followed by the institution, the assignment of an internal affirmative action officer who holds the responsibility for successful implementation, designing and using an internal review, report, monitoring and audit system for identifying problem areas, developing and using internal action programs designed to eliminate problem areas, and designing external action plans to eliminate future discriminatory practices (Lindgren et al., 1984; McCune & Matthews, 1974; Rubin, Whaley, Mitchell, & Sharp, 1984). Once this plan is developed, it is reviewed by the federal government only if the institution is required to undergo an affirmative action compliance review.

Research on affirmative action in higher education is limited. Constantini & King (1985) explored affirmative action opinions of students on the University of California at Davis campus. A survey was conducted in 1977, at the height of the controversial Bakke (Regents of the University of California v. Bakke, 1978) reverse discrimination case, and again in 1981, when the case had been settled and Bakke graduated from medical school. The data was analyzed by race, sex, political involvement and ideology, parental political background and social background. The findings of this investigation were that a student's position on affirmative action is affected by how the issue is framed (the level of support was higher when the operative word was "disadvantaged persons" rather than "minorities"), where the members of the research population are located politically (Democrats and self identified liberals were more favorable to affirmative action), who the

students are socially (affirmative action was supported mostly by those who would gain from its benefits), and when the queries were made (affirmative action had a higher positive opinion in 1977). Hitt & Keats (1984) also studied affirmative action opinions, surveying members of the Affirmative Action Association in Higher Education in a southwestern state. The purpose of the study was to identify the effective criteria for affirmative action in institutions of higher education. Thirteen factors were rank ordered in terms of their effectiveness. The strongest predictors of perceived affirmative action effectiveness were a receptive attitude and commitment from key university administration and the credibility of affirmative action programs and officers. The weaker predictors were providing a comprehensive training program for the affirmative action officer and developing creative social and academic approaches to affirmative action. Reed (1983) also found that a strong commitment to the goals of affirmative action from the governing body of an institution is the primary reason for its success and effectiveness.

The best resource for effective affirmative action in higher education is to combine the talents and energies of people who believe in the intent of the law. Institutions of higher education need to stop wasting their energy and money fighting adversaries over words on paper. Rather, the time and energy must be spent on producing intellectual and academic results which free colleges to attract the brightest and best. There will always be educators with strategies to present a good faith image yet still sabotage the intent of affirmative action, but it is those with a commitment who will make it work.

What began as a moral issue in 1941 is now clearly a legal one. What began as a concern for fair hiring practices has now expanded to cover modification of buildings for the handicapped and equal opportunity for

blacks, women, and minorities. Like many regulations which attempt to govern the morals of a human society, affirmative action reflects the intention of people who are just trying to do the right thing. The critical feature of any practical compliance strategy is the intention of the people behind it, not what is looks like or even how effective it is (Lindgren et al., 1984). In an institution so committed to social justice that it admitted blacks before the end of slavery and women before they had the right to vote, colleges and higher educational communities bear a significant responsibility to provide moral and intellectual leadership for matters of social justice (Wilson, 1985). Affirmative action is an issue of social justice and higher education, through effective leadership, must continue to renew its commitment to it.

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